Petition

81-205
No.

Office-Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 111, a labor organization, and ROBERT O. FIGG, an individual,

Petitioners

and

ALLEN DOUGLAS, WILLIAM WEAVER, J. W. MALONEY, JOHN O'MALLEY, DARRELL F. HANSGEN, HOMER INGRAM, THOMAS MC GINNIS, JOHN KECK, DONALD ROGANOVICH, EDWARD ARAMBASICH, GEORGE CHABUCOS, DAN YELOVICH, WILLIAM W. MEHUYS, PETER COATES, WILLIAM TUCKER, CHUCK F. KEELING, DOUGLAS T. MADSEN, JOSEPH MARCHESI, RICHARD CASEY, JAMES R. KENT, MEADE BALTZ, REUBEN SMITH, AND WILLIAM BODACH, as Trustees of IRON WORKERS TRI-STATE WELFARE PLAN,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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July 28, 1981

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QUESTIONS PRESENTED

1. Did Respondent trustees act arbitrarily and capriciously and violate their fiduciary obligations under the Employees' Retirement Income Security Act (ERISA) when they amended their health and welfare plan so as to deprive participants of accumulated "hours" credited to their reserve accumulation accounts?

2. Did the trustees violate the rights of participants who were beneficiaries of the collective bargaining agreements that gave birth to employers' obligation to pay prescribed wages and to make contributions to the Plan, particularly in light of evidence showing that contributions were secured at the cost of possible wage increases?

3. Did the collective bargaining agreements, along with representations and promises made to participants by Plan administrators and trustees that insurance credits were reserved to their accounts for insurance benefits when unemployed, create an irrevocable interest in the reserve accounts?

4. Whether and, if so, to what extent are the fiduciary obligations of trustees under ERISA proscribed by the Labor-Management Relations Act (LMRA)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 111, a labor organization, and ROBERT O. FIGG, an individual,

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ALLEN DOUGLAS, WILLIAM WEAVER, J. W. MALONEY, JOHN O'MALLEY, DARRELL F. HANSGEN, HOMER INGRAM, THOMAS MC GINNIS, JOHN KECK, DONALD ROGANOVICH, EDWARD ARAMBASICH, GEORGE CHABUCOS, DAN YELOVICH, WILLIAM W. MEHUYS, PETER COATES, WILLIAM TUCKER, CHUCK F. KEELING, DOUGLAS T. MADSEN, JOSEPH MARCHESI, RICHARD CASEY, JAMES R. KENT, MEADE BALTZ, REUBEN SMITH, AND WILLIAM BODACH, as Trustees of IRON WORKERS TRI-STATE WELFARE PLAN,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on May 1, 1981.

OPINION BELOW

The original opinion of the court of appeals was filed on May 1, 1981. It is unreported; it is reprinted in Appendix A *infra,* pp. A1-8.

JURISDICTION

The judgment of the court of appeals (A8) was entered on May 1, 1981. The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1) and Part V, Rule 19 of the Revised Rules of this Court.

STATUTES INVOLVED

The relevant provisions of the LMRA, 29 U. S. C. Section 186 and of ERISA, 29 U. S. C. Section 1104, are set forth in Appendix B hereto.

STATEMENT

A. Facts Below

The opinion below summarizes the factual underpinnings of this case. A more complete explication of facts may be found in Judge Perry's Findings of Facts and Conclusions, set forth in Appendix C hereto.[1] One basic point, however, should be highlighted, in order to clarify the underlying issues. Prior to current collective bargaining agreements, and for many previous years, Rule C of the Plan had provided that a certain number of hours an employee participant worked were to be credited to his "reserve accumulation account." *App. C, Stipulated Fact M.* Rule C and other eligibility rules were "designed in an effort to make certain that all employees working under the jurisdiction of Local Unions Participating in the Plan on a more or less regular basis will continue to remain insured if they are employed a nominal number of hours each year." *App. C, Stipulated Fact M. par. 2.* On April 15, 1977, the Trustees amended the Plan to terminate the eligibility of employees thirty days after their employer had stopped contributing to the Fund on their behalf. *App. C, Stipulated Fact N.* At the time of this amendment many employees (and members of Plaintiff Union) had earned enough reserve credits to entitle them to

[1] The appellate court found that the second sentence of Additional Finding P (App. C) was "clearly erroneous." This sentence says that "The crediting of withdrawing participants with hour bank or reserve accumulation benefits would not impair the financial condition of the Fund." The appellate court did not disturb the other findings of the trial court; these findings may therefore be considered conclusive.

insurance benefits in excess of thirty days in the event of unemployment.[2] This action was brought to seek a declaration that the Trustees exceeded their discretion and to rescind the amendment.

B. Proceedings Below

Petitioners filed a complaint, docketed as 77 C 11, on January 3, 1977. A bench trial was held on the fourth amended complaint; the court entered judgment in favor of Petitioners on April 23, 1980 (Appendix E). Respondents appealed. On May 1, 1981, the appellate court reversed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1.

This Case Presents Issues of Substantial Importance to the Public Which Should Be Decided by This Court. See *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393; *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 79.

This petition presents a significant issue to the public, as well as to the six-thousand participants in the Plan. Many health-insurance plans in the construction industry contain reserve accumulation provisions similar to those at issue here. Each of these plans is governed by trustees upon whom duties and obligations are imposed by ERISA, the LMRA, collective bargaining agreements and trust agreements. The rights of employee-participants are also derived from the same sources. This case presents a unique opportunity to resolve statutory and common-law issues affecting a substantial number of American working-people employed in a representative cross-section of industry. In this era of high unemployment, particularly in the

[2] See eligibility list, found in Supplemental Appendix, pp. 96-7, submitted to court of appeals, and reprinted here as Appendix D.

construction industry, few matters could be of more concern to employees than the safety and security of their labored-for insurance benefits during periods of unemployment. Medical costs rise; unemployment remains high. The degree to which, and whether, fund trustees can indenture employees to a particular fund or to a particular insurance carrier by cutting off their earned benefits should they withdraw is a significant social and legal question that this Court should address.

2.

This Case Presents an Extremely Important Question in the Administration of the LMRA and ERISA that Has not Been but Should Be Decided by this Court. See, e.g., *United States* v. *Ruzicka*, 329 U. S. 287. Further, this Case Presents an Important Question of First Impression under ERISA. See *American Federation of Musicians* v. *Wittstein*, 379 U. S. 171, 175.

The court below relied primarily on *Pierce* v. *NECA-IBEW Welfare Trust Fund,* 620 F. 2d 6th Cir. 1980), cert. den'd, 49 L. W. 3409. In *Pierce,* the court upheld "an amendment identical in wording to the one here challenged." *App. A5.* The Sixth Circuit, however, failed to consider whether the accumulated reserves were an earned and negotiated consideration of employment for which participants had given up higher wages or improved benefits. This issue, squarely presented to the trial court and to the appellate court,[3] has not been considered by this Court in the setting of an LMRA trust-fund administered under the fiduciary restrictions of ERISA.

The appellate court overlooked, and this Court has not had occasion to consider, the extent to which collective bargaining agreements restrain the exercise of discretion by trustees who

[3] See App. C, Additional Findings B through H.

govern funds these agreements established. The relationship among such trustees and the collective bargaining triumverate of union-employer-employee has never been spelled out or explored by this Court. In *Daniel* v. *Teamsters,* 561 F. 2d 1223 (7th Cir. 1977), reversed on grounds not relevant here, 439 U. S. 551, the Seventh Circuit, while dealing with securities rather than labor issues, said by way of dictum that contributions to LMRA pension funds were a form of consideration for labor, that "... employers are putting money into a fund for an employee's future use which he would otherwise be getting in his paycheck." In *W. W. Cross & Co.* v. *N.L.R.B.,* 174 F. 2d 875, 878 (1st Cir. 1949), the court said:

> [T]he word "wages in ... the [LMRA] embraces within its meaning direct and immediate economic benefits flowing from the employment relationship ... [s]o construed the word covers a group insurance program for the reason that such a program provides a financial cushion in the event of illness or injury arising outside the scope of employment at less cost than such a cushion could be obtained through contracts of insurance negotiated individually.

The question of whether the discretion of trustees is proscribed by the collective bargaining agreements that establish wages and welfare fund contributions is one never before addressed by this Court. Similarly, the extent to which the promises or representations of trustees to employees impose limitations on the exercise of discretion is one of first impression in this Court. Because of the closely interrelated nature of the collective bargaining agreements that establish employer trust obligations and the trust agreements and trust plans that fix the legal and administrative responsibilities of trustees appointed to carry out such obligations, two significant federal statutes—the LMRA and ERISA—and the duties imposed by each must be

considered in tandem and the inconsistencies, if any, between them resolved. For example, the following questions have not yet been answered:

> 1. If insurance benefits are wages that cannot unilaterally be reduced under LMRA, can insurance fund trustees, as here, in exercising discretion under ERISA, reduce the value of a reserve fund created by employer contributions under a collective bargaining agreement?
>
> 2. To what extent, if at all, can trustees bind a union, an employer, and employees to a particular form of multi-employer bargaining by manipulation of reserve funds so as to destroy their value should a party exercise its option under the LMRA to drop out of multi-employer/multi-union bargaining?

Other issues may come to mind. But there can be no doubt that the issues presented by this Petition are instrumental in the "federal common law" of labor under LMRA and in the unfolding litigation under the new ERISA statute. With this case, this Court has an opportunity to define the authority of ERISA-bound trustees in the context of the federal labor law, and thereby set to rest many of the continually perplexing problems that these trustees, looking to both laws, must face. By the same token, employers, unions and employees throughout the country will be given a standard to which they can look in balancing rights and obligations under dual ERISA/LMRA trust funds. Thus, this case does not merely raise the commonplace question of trustee discretion presented in *Pierce*. Of more pressing concern is the issue of whether and to what

extent trustee discretion is proscribed by the rules of collective bargaining established in harmony with the provisions of the LMRA.[4]

This case gives the Court a unique opportunity to deal with a substantial problem in the administration of two overlapping statutes in the field of labor law and trust administration. The problem presented is significant, in terms of the principles involved and in terms of the great number of people and institutions affected. Only this Court can now answer the weighty and serious questions raised by this litigation.

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[4] A review of decisions, arising outside of the unfair labor practice provisions of LMRA, that adopted the principles established by this Court in *N.L.R.B.* v. *Iron Workers Local Union No. 103,* 434 U. S. 335 (1979), shows the extent to which principles in apparently unrelated areas of labor law impinge upon and affect each other. In *Iron Workers* this Court held that union picketing to enforce a pre-hire construction industry agreement not supported by a majority of employees violated Section 8(b)(7)(C) of the LMRA. Many Courts have since been asked to consider whether fund-trustees can collect delinquent contributions pursuant to trust agreements and pre-hire agreements sanctioned by Section 9(f) of the LMRA but not supported by a majority of employees. See, e.g., *Trades Council* v. *E.C. Schafer Construction Co.,* ____ F. Supp. ____ 106 LRRM 2040 (M. D. La. 1980); *Trust Funds* v. *McGahee,* ____ F. Supp. ____ 107 LRRM 2740 (M. D. Fla. 1981); G.M. Masonery Co., 245 NLRB No. 54 (1979); *Constructors, Laborers & Teamsters H & W Plan* v. *Associated Wrecking Co.,* 484 F. Supp. 582 (D. Neb. 1980), rev'd ____ F. 2d ____, 106 LRRM 2257 (8th Cir. 1981). In these cases, fund trustees sought to vindicate their authority as trustees *qua* trustees, not as labor unions. But their rights as trustees were held to depend upon the enforcability of a collective bargaining agreement to which they were not privy. As here, principles derived from one source of law were superimposed upon another law. The same balancing of principles derived from separate sources is required here. Only this court can sort out the confusion certain to arise out of the meeting of conflicting principles at the intersection of two statutes covering the same parties in the same setting.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request this Court to issue its Writ of Certiorari in this matter.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1644

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL No. 111, a labor organization and ROBERT O. FIGG, an individual,

Plaintiffs-Appellees,

v.

ALLEN DOUGLAS, et al., as Trustees of IRON WORKERS TRI-STATE WELFARE PLAN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-11—J. Sam Perry, *Judge.*

ARGUED JANUARY 7, 1981—DECIDED MAY 1, 1981

Before CUMMINGS and CUDAHY, *Circuit Judges,* and BONSAL, *Senior District Judge.**

BONSAL, *Senior District Judge.* Defendants-appellants Allen Douglas, *et al.,* Trustees of the Iron Workers Tri-State Welfare Plan ("the Trustees"), appeal from a judgment of the United States District Court for the Northern District of Illinois, Eastern Division. The district court held that the Trustees lacked the authority

* Senior District Judge Dudley B. Bonsal of the Southern District of New York is sitting by designation.

to amend the Agreement and Declaration of Trust of the Welfare Plan ("the Agreement"), and rules and regulations thereunder, "in such a way as to deprive participants in the Welfare Plan under the jurisdiction of Local No. 111 of any of the benefits . . . which arise out of hours accumulated on their behalf in their Reserve Accumulation Accounts."

The plaintiffs are the International Association of Bridge, Structural and Ornamental Iron Workers Local No. 111 and Robert O. Figg, President of the Local Union ("Local 111").

The Iron Workers Tri-State Welfare Fund is a pooled, multi-union, multi-employer trust fund jointly administered pursuant to the Agreement by a Board of Trustees, half of whom are appointed by labor unions and half of whom are appointed by employers. The Fund provides participants and their families with hospital, medical care, death benefits and other benefits. It exists for the benefit of the employees of contributing employers (the participants do not contribute). The participants are members of eleven Local Unions which have collective bargaining agreements with their employers. Additional income of the Fund is derived from investment of reserves.

The Trustees are empowered by the Agreement to establish benefit levels and to promulgate eligibility rules. Article VI, Section 4 of the Agreement provides:

> The Trustees may promulgate such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided that such rules and regulations are not inconsistent with this Agreement and Declaration of Trust.

The eligibility rules permit an employee to enjoy "continued eligibility" under certain circumstances, even though he has not complied with the basic requirement stated in Sub-part A of the rules. Sub-part A provides that an employee's eligibility is to be determined on a quarterly basis; he must perform 250 hours of work during a three-month period to remain eligible for benefits during the subsequent three-month period.

Sub-parts B and C create exceptions to this requirement. Sub-part B provides for continued eligibility if the employee has worked for the specified numbers of hours during prior months. Sub-part C creates a "reserve accumulation account," in which the hours that an employee works for a contributing employer are credited to an employee's account. If an employee's account contains "hours" in excess of a figure designated by the Trustees, he may be eligible for benefits even though not in compliance with Sub-part A. Therefore, under the eligibility rules in effect prior to the amendment, an employee's eligibility could continue for at least three months, and indeed for longer periods under Sub-parts B and C, after the employer ceased making contributions on the employee's behalf.

On April 15, 1977, the Trustees, by a vote of eleven to five, amended the eligibility rules to limit the eligibility for benefits of employees whose employers had ceased to make contributions to the Fund. At the Trustees' meeting, Mr. McLeish, Consultant to the Fund, reported that as of December 31, 1976, the extended liability of the Fund exceeded its assets by approximately $400,000. Mr. Hanft, Administrator of the Plan, reported that disbursements had exceeded income during the first three months of 1977.

The amendment provided:

> In the event that a Collective Bargaining Agreement requiring contributions to the Welfare Fund is not succeeded by a Collective Bargaining Agreement requiring contributions to the Welfare Fund, then a Participating Employer which is no longer obligated under the terms of a Collective Bargaining Agreement to make contributions to the Welfare Fund shall cease being a Participating Employer on the date that the obligation terminates, and its Employees shall not be Eligible Employees as to any claims incurred on or after the thirty-first calendar day following the date on which the obligation to contribute terminated.

Under the amendment, certain employees are eligible for welfare benefits for a maximum of 31 days following

the date on which their employer is no longer obligated to make contributions to the Fund.

Plaintiffs argued at trial that the Trustees, in adopting the amendment, violated the Labor Management Relations Act, 29 U.S.C. §186, and the Employees' Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The district court concluded as a matter of law that the Trustees, in attempting to deprive participants of already earned reserve accumulations, had acted in a manner inconsistent with their fiduciary obligations. The district court held that the action of the Trustees was arbitrary and capricious and accordingly "rescinded" the amendment as it applied to members of Local 111 and enjoined the Trustees from amending the Plan to the detriment of members of Local 111.

The Trustees appeal and we reverse.

DISCUSSION

Justiciability

Local 111 has not withdrawn from the Plan but rather continues to be a participating Union. Therefore, the Trustees contend that Local 111's complaint, requesting declaratory relief, presents no "case or controversy" under Article III of the Constitution and thus no "justiciable" issues.

Section 502 of ERISA, 29 U.S.C. §1132(a)(1)(B), provides that "a civil action may be brought by a participant or beneficiary . . . to clarify his rights to future benefits under the terms of the plan." Local 111 seeks such a clarification; the right of its members to future benefits would be affected by the amendment in the event that it should later withdraw from the Plan. Therefore, the district court had jurisdiction under 29 U.S.C. §1132(e).*

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* However, in *Guthrie v. Dow Chemical Co.*, 445 F.Supp. 311 (S.D. Texas 1978) and *O'Brien v. Sperry Univac*, 458 F.Supp. 1179 (D.D.C. 1978), the courts rejected similar reasoning and held that plaintiffs were not seeking to clarify their rights to

(Footnote continued on following page)

In their complaint, Local 111 seeks declaratory relief. Pursuant to 28 U.S.C. §2201, a court may grant such relief in "a case of actual controversy." The Trustees argue that such a controversy does not exist, and that even though the district court had subject matter jurisdiction over the action, there existed no "justiciable" case to be resolved.

In view of the dispute between the parties as to whether the Trustees had the authority to amend the Plan in such a fashion as to deprive participants of accumulated "hours" in their reserve accounts, we believe that the district court's holding that a case or controversy under Article III of the Constitution exists was not erroneous. *Aetna Life Insurance v. Haworth*, 300 U.S. 227, 239-40 (1937); *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979). *See also International Longshoremen's Association, AFL-CIO v. Sea-Train Lines, Inc.*, 326 F.2d 916 (2d Cir. 1964); *El-Paso Building & Construction Trades Council v. El-Paso Chapter, Assoc. of Gen. Contractors of America*, 376 F.2d 797 (5th Cir. 1967).

Trustees' Authority to Amend

The Trustees contend that certain findings of fact and conclusions of law of the district court were clearly erroneous. They contest the district court's conclusions of law that they acted in an "arbitrary and capricious" manner in adopting the amendment and that they attempted to deprive participants of already earned reserve accumulations, thus acting in a manner inconsistent with their fiduciary obligations.

In a recent decision, *Pierce v. NECA-IBEW Welfare Trust Fund*, 620 F.2d 589 (6th Cir. 1980), *cert. denied*, 49 LW 3409, the Court of Appeals for the Sixth Circuit upheld an amendment identical in wording to the one here challenged. In *Pierce*, one of the participating Local Un-

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* *continued*
future benefits, but to have certain portions of the plans under review declared void. Accordingly, the courts held that since Section 1132 was inapplicable, they were without jurisdiction.

ions voluntarily withdrew from participation in the Fund approximately one year after the adoption of the challenged amendment. Benefits were terminated with respect to members of the withdrawing Union for all claims incurred after the expiration of the 31-day period.

The court, "agree[ing] in whole" with the reasoning of the district court (reported at 488 F.Supp. 559 (E.D. Tenn. 1978)), held that the Trustees' actions were not arbitrary and capricious but rather were for the sole benefit of the participants and beneficiaries of the Trust. The district court examined the applicable standards under the Labor Management Relations Act and ERISA and stated:

> Under LMRA the standard of conduct required of trustees of welfare and pension funds is that they not act in an "arbitrary and capricious" manner in the administration of the trust. *Local Union No. 5 Etc. v. Mahoning & Trumbull County Building Trades Welfare Fund, et al.*, 541 F.2d 636 (6th Cir. 1976); *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1976). Both LMRA and ERISA require that such fiduciaries manage the fund for the sole and exclusive benefit of the participants and beneficiaries. *See* 29 U.S.C. § 302 and 29 U.S.C. § 1104. Further relevant requirements of ERISA are that the trustees of such funds exercise the care and skill "that a prudent man" would exercise under like circumstances [29 U.S.C. § 1104(a)(1)(B)] and that they manage the fund in accordance with the documents governing the trust [29 U.S.C. § 1104(a)(1)(B)].
>
> Applying these standards to the actions of the Trustees in this lawsuit, the Court is of the opinion that the plaintiffs have failed to establish any grounds for judicial interference with such actions. *Pierce, supra* at 564.

The Agreement provides that "the Trustees may promulgate such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust . . . ." We find no

evidence of any abuse of such discretionary authority; indeed, the decision to adopt the amendment appears to have been made for the sole benefit of the employees covered by the Plan. In view of the reports made to the Trustees, they believed it necessary to limit the period during which claims of employees would be recognized once the employer had ceased to make contributions to the Fund. In so amending the Agreement, the Trustees were endeavoring to insure the viability of the Fund.

The district court found that "the crediting of withdrawing employee participants with hour bank or reserve accumulation benefits would not impair the financial condition of the Fund." A review of the record satisfies us that this finding is clearly erroneous. Indeed, the Trustees adopted the amendment because they feared that the Fund might become financially impaired. They did not act in an arbitrary and capricious fashion but rather within their discretion as fiduciaries. *See Pierce, supra.*

The district court concluded as a matter of law that "by attempting to deprive participants of already earned reserve accumulations or bank hours, the trustees have attempted to reduce their wages . . . ." However, welfare benefits do not become vested until a claim arises that is payable under the Plan; these benefits are contractual rights subject to amendment by the parties to the Agreement. *See Pierce, supra; Turner v. Local Union No. 302*, 604 F.2d 1219, 1226 (9th Cir. 1979). The finding of the district court that the Trustees, by adopting the amendment, were attempting to reduce wages is clearly erroneous.

Local 111 maintains that because wage and welfare contributions are "negotiated as one package," all rules and regulations issued by the Trustees concerning eligibility requirements must conform to the negotiated collective bargaining agreement. The district court accepted this contention and concluded as a matter of law that by amending the eligibility rules the Trustees acted "in a manner inconsistent with . . . their obligation to act in a manner consistent with the collective bargaining agreements."

We are not persuaded by this argument. In the absence of any specific language in the Trust Agreement subordinating it to the collective bargaining agreement, *see Alvares v. Ericksen*, 514 F.2d 156, 161 (9th Cir. 1975), we find controlling the language of the Trust Agreement, which authorizes the Trustees to adopt amendments by majority vote except when "in contravention of or inconsistent with the existing Collective Bargaining Agreement between the parties hereto." We find no such inconsistency, since the challenged amendment is operative only "in the event that a collective bargaining agreement requiring contributions to the Welfare Fund is not succeeded by a collective bargaining agreement requiring contributions to the Welfare Fund." In the event that no such successor agreement is reached, the union members will not participate in the Plan.

We believe that the Trustees, in adopting the challenged amendment, acted for the sole benefit of the participants in the Plan and displayed the care and skill that a prudent man would exercise under like circumstances. Accordingly, the judgment of the district court is reversed, and the action is dismissed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

CROSS REFERENCES

This section is referred to in 29 USCS §§ 1104, 1105, 1114.

RESEARCH GUIDE

Am Jur:
Am Jur 2d New Topic Service, Pension Reform Act §§ 116-119.

§ 1104. Fiduciary duties

(a)(1) Subject to sections 403(c) and (d) [29 USCS § 1103(c) and (d)], 4042 [29 USCS § 1342], and 4044 [29 USCS § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title [5

USCS § 5108; 18 USCS §§ 664, prec. 1001, 1027, 1954; 29 USCS §§ 301-309, 441, 1001-1003, 1021-1031, 1051-1061, 1081-1086, 1101-1114, 1131-1144].

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USCS § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USCS § 1107(d)(4) and (5)]).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(Sept. 2, 1974, P. L. 93-406, Title I, Subtitle B, Part 4, § 404, 88 Stat. 877.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective dates:
For effective date of this section, see 29 USCS § 1114 and note.

CROSS REFERENCE

This section is referred to in 29 USCS § 1105.

RESEARCH GUIDE

Am Jur:
Am Jur 2d New Topic Service, Pension Reform Act §§ 106 et seq.

§ 1105. Liability for breach by co-fiduciary

(a) In addition to any liability which he may have under any other provision of this part [29 USCS §§ 1101-1114], a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 USCS § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b)(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [29 USCS § 1103(a)(1) and (2)], if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

§ 186. Restrictions of payments to employee representatives

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce

in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [48 USCS §§ 301-327]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor

organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the require-

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(f) This section shall not apply to any contract in force on the date of enactment of this Act [June 23, 1947], until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. (June 23, 1947, c. 120, Title III, § 302, 61 Stat. 157; Sept. 14, 1959, P. L. 86-257, Title V, § 505, 73 Stat. 537; Oct. 14, 1969, P. L. 91-86, 83 Stat. 133; Aug. 15, 1973, P. L. 93-95, § 1, 87 Stat. 314.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act," referred to in this section, is the Labor Management Relations Act, 1947, and appears as 29 USCS §§ 141-144, 171-183, 185-187, 557, and amendments to 29 USCS §§ 151-158, 159-167.

Section 17 of Act Oct. 15, 1914, referred to in subsec. (e) of this section, was repealed by Act June 25, 1948, c. 646, § 39, 62 Stat. 992, and is covered by Rule 65, Federal Rules of Civil Procedure.

Sections 11 and 12 of the Act of Mar. 23, 1932, referred to in subsec. (e) and formerly appearing as 29 USCS §§ 111 and 112, were repealed by Act June 25, 1948, c. 645, § 21, 62 Stat. 862, and are covered by 18 USCS § 3692 and Rule 42(b), Federal Rules of Criminal Procedure.

Amendments:

1959. Act Sept. 14, 1959, substituted subsecs. (a) and (b) for former subsecs. which read:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value."; and

In subsec. (c), substituted clause (1) for former clause which read: "(1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer", and added clause (6).

1969. Act Oct. 14, 1969, P. L. 91-86, 83 Stat. 133, amended subsec. (c) of this section by striking out "or (6)" and inserting in lieu thereof "(6)" and by adding clause (7).

1973. Act Aug. 15, 1973, P. L. 93-95, § 1, 87 Stat. 314, amended subsec. (c) of this section by striking out "or (7)" and inserting in lieu thereof "(7)" and by adding clause (8).

APPENDIX C

[ORIGINAL]

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL UNION NO. 111, a labor organization, and ROBERT O. FIGG, an individual,
Plaintiffs,

vs.

ALLEN DOUGLAS, WILLIAM WEAVER, J. W. MALONEY, JOHN O'MALLEY, DARRELL F. HANSGEN, HOMER INGRAM, THOMAS MCGINNIS, JOHN KECK, DONALD ROGANOVICH, EDWARD ABAMBASICH, GEORGE CHABUCOS, DAN YELOVICH, WILLIAM W. MEHUYS, PETER COATES, WILLIAM TUCKER, CHUCK F. KEELING, DOUGLAS T. MADSEN, JOSEPH MARCHESI, RICHARD CASEY, JAMES R. KENT, MEADE BALTZ, REUBEN SMITH, and WILLIAM BODACH, as Trustees of Iron Workers Tri-State Welfare Plan,
Defendants.

No. 77 C 11

FINDINGS OF FACT and CONCLUSIONS OF LAW

This cause comes on for decision after a trial without a jury, no jury demand having been made by any of the parties.

The court heard evidence on behalf of all parties and the parties rested. The court then ordered the parties to file memoranda. The defendants, Allen Douglas, et al., as Trustees of Iron Workers Tri-State Welfare Plan, moved to suspend the briefing schedule and to dismiss the cause for want of jurisdiction. Leave was given to file said motion but that part of the motion which sought to suspend the briefing schedule was denied. The plaintiffs, International Association of Bridge, Structural and Ornamental Ironworkers Local No. 111, a labor organization, and Robert O. Figg, an individual, moved for leave to file a Fourth Amended Complaint; the motion was granted; and defendants were given leave to file an answer to said Fourth Amended Complaint. Both the Fourth Amended Complaint and the answer to said Fourth Amended Complaint were filed. The parties filed their respective memoranda setting forth their positions and views on all of the foregoing.

The court, having now read and considered all of the foregoing documents, the evidence adduced by the parties upon the trial, and the arguments of counsel for the parties, now makes the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

First, the court finds that the parties hereto entered into a signed Final Pretrial Order including stipulated facts and filed the same with the Clerk of this Court on December 23, 1977. The court hereby adopts the following therefrom and finds the stipulated facts to be as hereinafter set forth.

Stipulated Facts

A. That Defendant Trustees are the Trustees of the IRON WORKERS TRI-STATE WELFARE PLAN.

B. That the IRON WORKERS TRI-STATE WELFARE PLAN is a pooled Trust Fund jointly administered by a Board of Trustees composed of Employer and Union representatives pursuant to an Agreement and Declaration of Trust.

C. That the Trust Fund exists for the benefit of Employees of Contributing Employers.

D. That funding for the Trust Fund is derived from monies contributed by Employers in accordance with Collective Bargaining Agreements. The sole additional sources of income are derived from investments of reserves and self payments by Employee beneficiaries which are infrequently made.

E. The Trustees are required and empowered by the Agreement and Declaration of Trust to establish and promulgate eligibility rules.

F. That Defendant Trustees are governed by the provisions of the Agreement and Declaration of Trust under which the IRON WORKERS TRI-STATE WELFARE PLAN is maintained.

G. That this Court takes notice of Article VI, Section 4, of the Agreement and Declaration of Trust, which provides as follows:

> *Section 4.* The Trustees may promulgate such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided that such rules and regulations are not inconsistent with this Agreement and Declaration of Trust.

H. That there are a number of Iron Workers Local Unions participating in the IRON WORKERS TRI-STATE WELFARE FUND.

I. That as of the date of this order no local union has announced any intention to withdraw from participation in the IRON WORKERS TRI-STATE WELFARE FUND.

J. That if a local were to withdraw, no further contributions would be received by the Trustees on behalf of that Local.

K. That the IRON WORKERS TRI-STATE WELFARE PLAN currently provides benefits for Employees, defined, effective April 15, 1977 in the Agreement and Declaration of Trust as follows:

Section 2. *Employees*

(a) Subject to subsection (b) of this Section "Employee" means and includes:

(i) Any iron workers employed by an Employer, on whose behalf Union acts as collective bargaining agent and who is covered by the terms of a collective bargaining agent and who is covered by the terms of a collective bargaining agreement requiring contributions to the Trust hereby created;

(ii) Any full-time employee of an Employer who is not employed as an iron worker by said Employer, providing that the said Employer agrees to make and the Trustees agree to accept contributions on behalf of all of the full-time Employees of said Employer.

(b) In the event that a collective bargaining agreement requiring contributions to the Welfare Fund is not succeeded by a collective bargaining agreement requiring contributions to the Welfare Fund, then a Participating Employer which is no longer obligated under the terms of a collective bargaining agreement to make contributions to the Welfare Fund shall cease being a Participating Employer on the date that the obligation terminates, and its employees shall not be Eligible Employees as to any claims incurred on and after the thirty-first calendar day following the date on which the obligations to contribute terminated.

L. That this amendment was passed after the Consultant recommended that a rule such as the one adopted be passed, but without the extra 31 days of eligibility that the Trustees eventually decided upon.

M. That the 1977 Plan booklet eligibility rules provided, in part, as follows:

CONTINUED ELIGIBILITY TERMINATION OF INSURANCE AND RESERVE ACCUMULATION ACCOUNT

The following Rules have been designed in an effort to make certain that all employees working under the jurisdiction of Local Unions participating in the Plan on a more or less regular basis will continue to remain insured if they are employed a nominal number of hours each year. The following Rules make it possible to count for the purpose of continuing insurance eligibility all contribution hours received on behalf of an employee over a full 12 month period.

A. Continued Eligibility:

Once insured, an employee will continue to remain insured for at least three months. He will also continue to remain insured for succeeding three month intervals if he has the required hours of contribution made on his behalf. Contribution hours from all contributing employers are counted. Therefore, if an employee moves from one employer to another, his insurance coverage will be continued, providing he works the hours required.

It is important that all employers for whom an employee works report his work hours and make contributions promptly as his coverage is dependent upon payment into the Fund by his employer.

B. Termination of Insurance:

If an employee does not have the required hours of contribution, his insurance may terminate on one of the four termination dates which follow:

1. On April 30

Unless he has contributions of:

250 hours for the three month period of January, February and March, or

500 hours for the six month period of October through March, or

750 hours for the nine month period of July through March, or

1,000 hours for the twelve month period of April through March.

2. On July 31

Unless he has contributions of:

250 hours for the three month period of April, May and June, or

500 hours for the six month period of January through June, or

750 hours for the nine month period of October through June, or

1,000 hours for the twelve month period of July through June.

C. Reserve Accumulation Account

The hours an Employee works for contributing employers are credited to the Employee's account. From these hours are deducted the minimum eligibility hours requirement as shown in the Termination of

Insurance provisions. From time to time the Trustees shall determine the annual hourly requirement to support the benefit program. All contribution hours earned in excess of this annual requirement will be held in each Employee's Reserve Accumulation Account, up to a maximum of 750 hours. Such Reserve Account hours will be used for continued eligibility, when required by the Employee. One reserve hour for each contribution hour will be credited for the first 500 Reserve Account hours. For any hours in excess of 500 hours, one Reserve Account hour will be credited for two contribution hours.

N. That in or about the month of December 1977 the Plan published a summary annual report for the fiscal year ending December 31, 1976 which among other things contains a Notice to Interested Participants as follows:

To All Participants:

Effective April 15, 1977, the eligibility rules were changed to limit eligibility for employees of employers who are no longer Contributing Employers under the Plan. Such employees will remain covered for Welfare benefits for a maximum of thirty (30) days following the day their employer ceases to contribute to the Plan. Beginning on the thirty-first (31) day following the day their employer ceases to contribute, coverage for Welfare benefits will terminate. The exact text of this change is as follows:

In the event that a collective bargaining agreement requiring contributions to the Welfare Fund is not succeeded by a collective bargaining agreement requiring contributions to the Welfare Fund, then a Participating Employer which is no longer obligated under the terms of a collective bargaining agreement to make contributions to the Welfare Fund shall cease being a Participating Employer on the date that the

obligation terminates, and its employees shall not be Eligible Employees as to any claims incurred on and after the thirty-first calendar day following the date on which the obligations to contribute terminated.

O. That the EBS-1 Plan Description form filed by the Fund Office on July 15, 1977 shows circumstances other than termination of employment or retirement causing ineligibility, as follows:

> If a Participating Local Union does not negotiate contributions the member's eligibility is terminated after 31 days.

II. ADDITIONAL FINDINGS OF FACT

A. Article VII, Section 1, of the Agreement and Declaration of Trust provides that:

> ... no amendment shall divert the fund as then constituted, or any part thereof, to a purpose other than that set forth in Section 1. of Article III of the Agreement and Declaration of Trust, nor shall there be any amendment ... which will be in contravention of or inconsistent with the existing Collective Bargaining Agreement between the parties hereto.

B. Article VII, Section 1, of the Agreement and Declaration of Trust also requires that such agreement conform to any "existing Collective Bargaining Agreement". Accordingly, rules and regulations promulgated by the Trustees pertaining to "eligibility and amount of benefits" must conform to any existing collective bargaining agreement; and by terms of the agreement and Declaration of Trust, the Trustees are without authority to establish rules inconsistent with such collective bargaining agreement.

C. Article 9, paragraph 3, of the collective bargaining agreement between Plaintiff Local Union No. 111 and the

Construction Employers Council of MDI, Inc., provides in Article 9, paragraph 3, that should either the Welfare or Pension Plan terminate, "the amount . . . of required employer contributions . . . on and after the termination date or dates, shall be added to the hourly rate".

D. Article 10, Section 4, of said collective bargaining agreement requires that a contractor-employer shall be required upon request by the Union to put up a $10,000.00 bond "to insure payment of all negotiated wages and contributions".

E. Article 24 of said agreement provides that it is intended to cover "all matters of wages, hours, and other conditions of employment including insurance benefits, welfare funds, pension or benefit plans or similar or related subjects . . .".

F. The established practice of unions and employer signatories to the aforesaid agreement and Declaration of Trust is to negotiate wages and welfare fund contributions as a single package during negotiation of the collective bargaining agreement. Upon receipt of a recommendation from the Trustees of the welfare plan as to the monies required for the fund to operate, the membership of the applicable union decides how the total economic contributions of the employers are to be split up between wages and fringe benefits, including welfare fund contributions.

G. The collective bargaining agreement by and between Ironworkers Local 395 for the period June 1, 1976 through June 1, 1979 contained the following wage and welfare benefits schedule:

	Wages per hour	Welfare contributions per hour
June 1, 1976		
Structural, Ornamental, etc.	$11.73	$.50
Sheeter	$11.98	$.50
September 1, 1976		
Structural, Ornamental, etc.	$11.58	$.65
Sheeter	$11.83	$.65

The Local 395 Agreement thus provided that in September 1976 wages were reduced by the exact amount that welfare contributions were increased.

H. Richard Hanft, the administrative manager of the Plan, was aware that there had been a local union that had accepted reduced benefits rather than increase their contributions of the welfare fund.

I. The purpose of the Reserve Accumulation Account established by defendants as Rule C contained in the Welfare Plan booklet and eligibility rules is to give benefits to the participants during a time of unemployment so that they could continue having benefits available to them. An employee who has accumulated reserve or bank hours under eligibility Rule C has earned these hours by his previous work. The Reserve Accumulation Accounts provide benefits to employees and if necessary to use these banked hours.

J. Other than the master insurance policy which is not distributed to employee participants, the sole source of information made available to participants regarding the plan are summary plan descriptions (plan booklets) and supplements mailed to the participants by the Trustees. The purpose of these descriptions, as required by the Employee Retirement Income Security Act (ERISA) and Department of Labor regulations, is to describe in layman's terms what the program is all about to the average person under the plan. A summary of the plan in layman's terms is mailed to participants because such a summary is more easily understood.

K. Computer print-out forms prepared under the authority of the Trustees are made available to the union that represents the plan participants to show the future eligibility of such participants to take part in the plan.

L. The Plan Description Form EBS-1 submitted by the Trustees to the Department of Labor pursuant to ERISA requirements and Department of Labor regulations on May 28,

1976 stated that the only "circumstances (other than termination of employment or retirement) causing ineligibility, denial, loss, forfeiture or suspension of welfare benefits" were illness, layoffs and strikes.

M. The EBS-1 report submitted by the Trustees to the Department of Labor July 15, 1977, after the initial complaint had been filed, stated that "ineligibility, denial, loss, forfeiture or suspension of welfare benefits" also occurs if a participating local union does not negotiate a continuance of contributions . . ." In that event, the members' eligibility is terminated after 31 days.

N. About 6,000 workers are provided health and welfare insurance benefits under the welfare plan.

O. Accumulation of hours under eligibility Rule C has been agreed to by participating employers in order to bring the greatest good to the greatest number of people. To achieve that end, some form of accumulation is required.

P. Less liberal eligibility rules under the plan would allow the Trustees to take the same rate of employer contributions and buy more benefits. The crediting of withdrawing employee participants with hour bank or reserve accumulation benefits would not impair the financial condition of the fund.

Q. Withdrawal of participants from the fund would reduce the cost of administration, including the cost of administering the Reserve Accumunation Accounts.

R. Pro rata distribution of banked or accumulated liability to withdrawing participants would not affect the continued operation of the fund.

III. CONCLUSIONS OF LAW

A. *Relating To Issue Of Case Or Controversy.*

This litigation presents a case or controversy under Article III of the Constitution of the United States of America and this litigation presents a cause of action over which the Court has subject matter jurisdiction which is justiciable. Further, Section 502 of ERISA provides specifically that a Federal District Court has jurisdiction over an action brought by a participant or beneficiary of a welfare plan to clarify his rights to future benefits under the plan, to enjoin any act or practice which violates the terms of the plan and to obtain other appropriate equitable relief, such as sought by Plaintiff in this litigation. This Court has jurisdiction over this litigation.

B. *Relating To Issues Other Than Constitutional Issues.*

1. Plan participants are third party beneficiaries of the Agreement and Declaration of Trust.

2. Welfare contributions are, as a matter of law, a form of wages negotiated by the parties in their collective bargaining agreement.

3. Wages and contributions to the welfare fund are interrelated and inseparable.

4. Employers put money into a fund for an employee's future use which he would otherwise be getting in his paycheck.

5. Welfare benefits are, and may be, obtained at the cost of possible wage increases.

6. There is also an interrelation between accumulated reserve or bank hours and higher immediate welfare benefits in that trustees have the authority and discretion to buy more benefits for plan participants for the same amount of employer contributions by tightening eligibility requirements.

7. By attempting to deprive participants of already earned reserve accumulations or bank hours, the trustees have attempted to reduce their wages in a manner inconsistent with their fiduciary obligations and their obligation to act in a manner consistent with the operative collective bargaining agreements.

8. Plan participants are entitled to receive the benefits of their prior labor in the form of previously accumulated reserve hours for their use when needed.

9. The action of the Trustees in attempting to reduce the accumulated reserve benefits of employees is arbitrary and capricious and cannot be permitted.

10. The Trustees' decision to deprive employees of their accumulated reserve or bank hours was not, as required by the law, economically justifiable and for this reason also was arbitrary, capricious and beyond their fiduciary discretion.

11. In any event, under "Federal Common Law" as required by ERISA, courts are not compelled to test the propriety of the actions of the trustees by a standard of arbitrary and capricious conduct. Accordingly, even if the actions of the Trustees were not arbitrary and capricious, an attempt to unilaterally deprive employees of future benefits, which are a form of wages, cannot be permitted.

12. The Trustees failed to utilize care in exercising their discretion in amending the plan to deprive employee participants of their reserve accumulation or hour bank benefits.

ENTER:

/s/ J. S. Perry
Judge

Dated: February 8, 1979

APPENDIX D

Plaintiffs' Contested Exhibit A

NUMBER	NAME		LAST TERM	REIN DATE	ELIG 35	ELIG 40	ELIG 50	ELIG AT LE	
LOCAL 111 EMPLOYEES ELIGIBLE UNTIL AT LEAST 10-30-75									
112-30-3177	MARTIN G	5	-	-	9-68	-	8-72	-	4-31-76
199-34-6867	CURTIN D A	5	-	-	10-74	10-74	10-74	-	10-31-75
212-54-1954	HUFFINE J D	6	10-70	9-75	1-70	-	11-73	9-75	1-31-76
229-36-5994	KINZER R	5	-	-	9-68	-	5-73	-	4-31-76
234-68-0151	SIMPKINS JACKIE	R6	-	-	8-68	-	9-72	9-75	4-31-76
247-70-0111	HANNIFLRD A	6	10-72	9-73	8-68	-	9-73	8-75	1-31-76
251-64-3597	SMITH EDGAR F	6	-	-	10-68	-	8-73	8-75	4-31-76
252-44-7034	CARTER WALTER	6	-	-	9-75	9-75	9-75	9-75	10-31-75
260-76-5461	CROSBY JAMES	6	-	-	-	-	-	8-75	1-31-76
265-60-7905	YARBROUGH J A	6	-	-	3-71	-	9-72	9-75	4-31-76
299-24-5652	WOLLITZ HERMAN H	5	-	-	1-72	-	9-72	-	10-31-75
303-62-8101	KAMPHUES M N	5	10-71	2-74	9-68	-	2-74	-	1-31-76
307-16-9481	GROSS H	5	-	-	10-68	-	11-72	-	10-31-75
307-40-5771	CROW HERMAN L	5	-	-	10-68	-	2-73	-	4-31-76
308-18-7005	CULBERTSON CHESTER	5	-	1-72	6-71	-	9-72	-	4-31-76
308-36-2466	KOHLER EIVIN	5	-	4-72	9-68	-	11-72	-	4-31-76
308-54-5309	JONES THOMAS J	6	-	-	5-75	5-75	5-75	5-75	10-31-75
311-26-7139	PORTER P L	5	4-71	7-71	8-71	-	9-73	-	4-31-76
312-32-1432	BUSSIE A J	6	-	-	8-68	-	2-73	8-75	1-31-76
318-34-3065	BELL B	5	-	-	11-68	-	9-72	-	4-31-76
318-36-7690	STEFKO JOSEPH	5	-	-	9-75	9-75	9-75	-	10-31-75
319-44-8359	RANGEL G	5	-	-	8-73	8-73	8-73	-	10-31-75
320-18-5431	BLISS JAMES F	6	-	12-65	1-69	-	8-72	8-75	4-31-76
320-28-8260	KING GEO JR	6	-	-	8-68	-	5-73	8-75	4-31-76
320-32-6833	MANER KENN	5	-	-	8-68	-	9-72	-	4-31-76
321-36-7529	SHINN JAMES R	5	-	-	10-68	-	8-72	-	4-31-76
321-38-0003	JOHNSON D	5	-	-	1-70	-	9-72	-	4-31-76
323-28-4993	HARSY R F	5	7-73	1-75	2-68	-	1-75	-	10-31-75
323-28-6132	PLAMER JERRY	5	1-70	9-71	9-71	-	10-72	-	10-31-75
323-36-5183	MEIRHAGHE F L	6	-	-	4-71	-	9-72	8-75	4-31-76
323-36-5528	HUNTLEY R	6	10-74	8-75	9-68	-	8-72	8-75	1-31-76
324-36-1151	PRITCHARD ROGE	5	-	-	-	-	1-75	-	1-31-76
324-54-6358	TUNE VICTOR	5	-	-	5-75	5-75	5-75	-	10-31-75
325-42-6398	HARTMAN M	6	-	-	9-68	-	9-72	9-75	4-31-76
326-48-3785	JOHNSON D	5	4-73	6-73	-	-	10-72	-	1-31-76
327-01-1364	HASKINS O F	5	-	-	9-68	-	10-72	-	4-31-76
327-03-6490	WILSON J C	6	1-67	5-67	10-68	-	8-72	8-75	10-31-75
327-12-7871	COLE J	6	-	-	8-68	1-73	1-73	8-75	4-31-76
328-30-7238	SPENCER T	6	4-73	4-74	11-68	-	9-73	1-73	1-31-76
328-46-8772	UBERG PATRICK	5	-	-	11-74	11-74	11-74	-	1-31-76
328-52-9152	UGLE R G	6	-	-	10-74	10-74	10-74	9-75	1-31-76
329-14-2706	HARTMAN J	5	-	-	9-68	-	9-72	-	4-31-76
329-14-3307	NEWTON E	5	-	-	9-68	-	9-72	-	4-31-76
330-05-3239	NELSON LEO	5	4-70	7-70	12-68	-	10-72	-	4-31-76
330-05-6450	SKEEN JAMES C	5	1-72	6-73	10-68	-	6-73	-	1-31-76
330-05-6892	MCNAUGHT D	5	-	-	9-68	-	1-73	-	10-31-75
330-09-9479	KUNTZ CARL D	5	-	-	9-68	-	9-72	-	10-31-75
330-[illegible]-5109	WEEKS L	5	-	-	8-68	-	12-72	-	4-31-76
330-24-5187	MAYNARD ROBERT	5	-	-	9-68	-	4-73	-	4-31-76
330-24-6388	ZIEGLER R L	6	-	-	8-68	-	8-72	8-75	4-31-76
330-36-7719	ECKERT C W	6	4-72	2-73	7-70	-	2-73	8-75	4-31-76
331-[illegible]-0424	KUPF F N	5	-	-	10-68	-	10-72	-	10-31-75
331-07-2556	MELBOURN L	5	-	-	8-68	-	8-72	-	4-31-76

BA-96

Plaintiffs' Contested Exhibit 9 B

Def'l #9 ID 12-1-77

8/ /77 LOCAL 111 ELIGIBILITY LIST PAGE 1

EMPLOYEES ELIGIBLE UNTIL AT LEAST 9-31-77

SA-97

S.S. NUMBER	NAME	RATE	THRU
112-30-3177	MARTIN GERALD	65	7-78
202-14-4765	SHERRETTS H S	65	10-77
212-44-1954	HUFFINE JAMES	65	1-78
229-36-5998	KINZER RONALD	65	7-78
234-68-0151	SIMPKINS J	65	7-78
251-66-7664	EICHER E	65	10-77
261-42-5820	ELLIOTT EDWARD	65	7-78
265-60-7905	YARBROUGH JOHN	65	7-78
303-42-8101	KAMPHUES NICKE	65	4-78
307-40-5771	CROW HERMAN	65	7-78
308-54-5309	JONES THOMAS J	65	1-78
312-32-1432	RUSSIE ARLEN	65	7-78
318-36-7690	STEFKO JOSEPH	65	1-78
319-24-0066	HERNANDEZ JOE	65	1-78
319-36-7073	WALSH G	65	10-77
320-18-5431	BLISS JAMES	50	1-78
320-28-8260	KING G JR	65	7-78
320-32-6831	THURMAN ERNEST	65	10-77
320-32-6833	MANER KENNETH	65	7-78
321-36-7529	SHINN JAMES R	65	7-78
321-38-0003	JOHNSON DANA H	65	7-78
323-18-7983	IRZYK W	65	10-77
323-36-5183	MEIRHAEGHE FRA	65	7-78
323-36-5528	HUNTLEY LEROY	65	1-78
324-46-9263	O BRYAN LEO	65	1-78
325-42-6398	HARTMAN MICHAE	65	7-78
326-42-9546	PETERSON DENNI	65	1-78
326-48-3785	JOHNSON DWYLAN	65	7-78
327-01-1364	HASKINS O F	65	7-78
327-12-7871	COLE JOSEPH A	65	7-78
327-52-7539	LUSINSKI WILLI	65	1-78
328-44-0511	KAMINSKI RONAL	65	10-77
328-46-8335	BASSETT TOM	65	10-77
328-46-8772	O BERG PATRICK	65	10-77
329-14-2706	HARTMAN JOHN E	65	7-78
329-14-3307	NEWTON EUGENE	50	10-77
329-40-0638	MEIRHAEGHE DAV	65	4-78
330-05-6062	FINCH DEAN A	65	10-77
330-05-6892	MC NAUGHT DALE	65	10-77
330-12-5109	WEEKS HOWARD E	65	1-78
330-24-5187	MAYNARD ROBERT	65	7-78
330-24-6388	ZIEGLER ROBERT	65	7-78
330-36-7719	ECKERT CHARLES	65	7-78
331-34-8645	MC GIMPSEY JAM	65	7-78
332-12-7195	MILBURN GLENN	65	1-78
332-14-4269	FLANAGAN E E	65	7-78
332-16-9836	NICHELS JOHN	65	7-78
333-12-1178	FIGG ROBERT	65	7-78
334-38-5052	MC GIMPSEY DEN	65	1-78
334-38-5466	BARTELL DONALD	65	1-78
335-24-1823	COURTWRIGHT G	65	7-78
335-44-1765	JOHNSON WAYLAN	65	1-78
335-44-1923	DUNCAN RICHARD	65	1-78
336-20-4089	AVERY LEE	65	10-77

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

For The Northern District of Illinois

Eastern Division

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, AND ORNAMENTAL IRON WORKERS LOCAL UNION #111, ET AL.,

Plaintiffs,

vs.

ALLEN DOUGLAS et al., as Trustees of IRON WORKERS TRI-STATE WELFARE PLAN,

Defendants.

No. 77 C 11

FINAL JUDGMENT AND ORDER

This case having been tried by the Court sitting without a jury, the Court having entered its finding of facts and conclusions of law herein, judgment having been entered in accordance therewith on February 8, 1978, and the Court having reviewed Plaintiff's Motion for entry of "final judgment", this final judgment is entered in accordance therewith as follows:

It is ADJUDGED AND DECREED:

1. That this court has jurisdiction over this matter.

2. That this court has the specific statutory authority under 29 U. S. C. Section 1132 to clarify the future rights of participants in and beneficiaries of the Iron Workers Tri-State Welfare Plan, and to order appropriate equitable relief.

3. That Defendants, the Trustees of the Welfare Plan, lacked the authority and discretion to alter or amend the Agreement and Declaration of Trust of the Welfare Plan, and the rules or regulations thereunder, so as to deprive participants in the Welfare Plan under the jurisdiction of Plaintiff Union (Local # 111) prospectively or otherwise, of any benefits arising out of hours earned by them and credited to their Reserve Accumulation Accounts.

4. Participants in and beneficiaries of the Welfare Plan under the jurisdiction of Local #111 are entitled to receive the benefit of hours accumulated in their Reserve Accumulation Accounts for insurance purposes in accordance with the Welfare Plan and its rules and regulations in effect prior to the amendment of the Welfare Plan by Defendants on April 15, 1977.

Accordingly, it is ORDERED:

1. That if contributions by employers on behalf of participants in the welfare plan under the jurisdiction of Local #111 should cease, Plaintiffs shall give such participants the bank hour credits listed in the last "Local #111 Eligibility List" published by Plaintiffs immediately prior to the date contributions have ceased.

2. That the amendment to the Welfare Plan of April 15, 1977 shall be, and hereby is, rescinded insofar as it applies to participants under the jurisdiction of Local #111.

3. That Defendants shall be, and hereby are, permanently enjoined from amending the Welfare and rules and regulations thereunder in such way as to deprive participants in the Welfare Plan under the jurisdiction of Local #111 of any of the benefits contained in the Welfare Plan and its rules and regulations in effect prior to April 15, 1977 which arise out of hours accumulated on their behalf in their Reserve Accumulation Accounts.

4. That, should contributions by employers on behalf of member or persons under the jurisdiction of Local #111 who are participants in the Welfare Plan under the jurisdiction of Local #111 cease, such persons shall continue to be entitled to and shall receive all benefits contained in the Welfare Plan in effect prior to April 15, 1977 which arise out of hours accumulated in their Reserve Accumulation Accounts. Specifically, such persons shall be entitled to insurance and welfare benefits under the Welfare Plan to the extent permitted, as measured by the hours accumulated in their Reserve Accumulation Accounts.

5. That Plaintiff's costs of action and reasonable attorney's fees shall be, and hereby are, assessed against Defendants pursuant to 29 U. S. C., Section 1132(g), as follows:

Attorney's Fees	Twenty Thousand, Six Hundred and Ninety-Four Dollars ($20,694.00).
Costs:	Nine Hundred and Fifty-seven Dollars and Sixty-three Cents ($957.63).

Enter:

/s/ J. S. Perry
Judge

Dated: April 23, 1980

Opposition

No. 81-205

Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL NO. 111, a labor organization and ROBERT O. FIGG, an individual,

Petitioners

vs.

ALLEN DOUGLAS, WILLIAM WEAVER, J. W. MALONEY, JOHN O'MALLEY, DARRELL F. HANSGEN, HOMER INGRAM, THOMAS MC GINNIS, JOHN KECK, DONALD ROGANOVICH, EDWARD ARAMBASICH, GEORGE CHABUCOS, DAN YELOVICH, WILLIAM W. MEHUYS, PETER COATES, WILLIAM TUCKER, CHUCK F. KEELING, DOUGLAS T. MADSEN, JOSEPH MARCHESI, RICHARD CASEY, JAMES R. KENT, MEADE BALTZ, REUBEN SMITH, AND WILLIAM BODACH, as Trustees of IRON WORKERS TRI-STATE WELFARE PLAN,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

HUGH J. MCCARTHY, JR.
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(312) 372-8587
Counsel for Respondents

August 26, 1981

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTIONS PRESENTED

The first and second questions presented in the Petition for Writ of Certiorari are inaccurate in that neither the Petitioners nor anyone represented by either of them have been deprived of any benefits under the Plan.

The third question presented in the Petition for Writ of Certiorari is inaccurate in two respects. It refers to benefit payments to unemployed individuals, which is not in issue in this case. It also refers to "promises" when, in fact no "promises" were ever made.

The fourth question presented in the Petition for Writ of Certiorari implies a conflict between two federal statutes when there is no such conflict.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS LOCAL NO. 111, a labor organization and ROBERT O. FIGG, an individual,

Petitioners

vs.

ALLEN DOUGLAS, WILLIAM WEAVER, J. W. MALONEY, JOHN O'MALLEY, DARRELL F. HANSGEN, HOMER INGRAM, THOMAS MC GINNIS, JOHN KECK, DONALD ROGANOVICH, EDWARD ARAMBASICH, GEORGE CHABUCOS, DAN YELOVICH, WILLIAM W. MEHUYS, PETER COATES, WILLIAM TUCKER, CHUCK F. KEELING, DOUGLAS T. MADSEN, JOSEPH MARCHESI, RICHARD CASEY, JAMES R. KENT, MEADE BALTZ, REUBEN SMITH, AND WILLIAM BODACH, as Trustees of IRON WORKERS TRI-STATE WELFARE PLAN,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, The Trustees of the IRON WORKERS TRI-STATE WELFARE PLAN, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Decision of the United States Court of Appeals for the Seventh Circuit.

STATUTORY PROVISIONS INVOLVED:

29 U. S. C. § 1051(1)

§ *1051. Coverage* Part 2—Participation and Vesting

This part shall apply to any employee benefit plan described in Section 1003(a) of this title (and not exempted under Section 1003(b) of this title) other than—

(1) an employee welfare benefit plan;

Miscellaneous Authorities Cited

Legislative History of the Employee Retirement Income Security Act of 1974. Prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare United States Senate (April 1976)

Vol. II, p. 3379

Vesting

Vesting refers to the nonforfeitable right or interest which an employee participant acquires in the pension fund. The benefit credits may vest in an employee immediately, although in most cases participants do not become eligible for vesting of benefits until a stipulated age or period of service, or a combination of both, is attained.

Vol. III, p. 4540

Accrued benefit

Under the conference substitute, the term "accrued benefit" refers to pension or retirement benefits. The term does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for such expenses), or disability benefits which do not exceed the normal retirement benefit payable at age 65 to an employee with comparable service under the plan, or to life insurance benefits payable as a lump sum.

STATEMENT OF THE CASE

The Respondents believe that the Statement of the Case as presented in the Petition is incomplete and, as a result may be misleading. For that reason the following brief additional statement is submitted.

The Iron Workers Tri-State Welfare Fund is a jointly trusteed employee welfare benefit fund which provides Participants and their families with hospital, medical care, death and other benefits.[1] It is managed by a Board of Trustees, half of whom are appointed by labor organizations and half of whom are appointed by management.[2]

The Defendant Trustees manage a multi-employer plan which is somewhat unique as it also is multi-union in scope.[3] From its inception it has expanded to the point where it exists for the benefit of Employees of contributing Employers who are represented for the purpose of collective bargaining by eleven different Local Unions.[4]

Each of these Local Unions has separately negotiated Collective Bargaining Agreements with Employers under which contributions are required to be made to the Trustees of the Iron Workers Tri-State Welfare Fund.[5]

The Trustees are governed by an Agreement and Declaration of Trust under which the Trustees are empowered and required to promulgate eligibility rules.[6]

Page references are to the pages of the Appendix of Defendants-Appellants filed with the Court of Appeals for the Seventh Circuit.

[1] Stipulated Facts No. (1)B & C (A-29); Exhibit 10A, Article III, Section 1(b) (A-73).

[2] Stipulated Fact No. (1)B (A-29).

[3] *Id.*

[4] Stipulated Fact No. (1)H (A-30); Transcript, p. 21, lines 5-9 (A-48).

[5] Transcript, p. 13, lines 15-20 (A-45).

[6] Stipulated Facts No. (1)E, F and G (A-29 and 30); Transcript, p. 13, line 21 through p. 14, line 1 (A-45 and 46); Trial Transcript p. 159, lines 15-18 (A-55).

The Trustees must decide how to utilize the monies that are contributed to the Trust Fund. They must establish benefit levels for different types of medical procedures. They must also establish eligibility rules to determine which persons are entitled to receive these benefits.[7]

The Trustees must ensure that the Trust Fund remains solvent. To control costs they may do one of two things. They may increase or decrease the benefit levels and/or they may liberalize or tighten the eligibility rules.[8]

The eligibility rules are designed to permit Participants to continue to be eligible for benefits even during periods of less than full employment.[9] This is done by granting benefits to a Participant who meets the requirements of the general eligibility rule or one of the two exceptions to it.[10]

Because this Trust Fund involves more than one local union, it is possible that one of the participating local unions might withdraw from participation. In the event that a Local Union were to withdraw, no further monies would be forthcoming from the Employers working in that Local Union's jurisdiction.[11]

An amendment to the Trust Agreement was adopted on April 15, 1977 to deal with the situation where a Local Union would voluntarily cease participation in the Trust Fund by limiting one of the exceptions to the general eligibility rule.[12] That amendment was challenged in this litigation.[13]

---

[7] *Id.*

[8] Transcript, p. 25, lines 9-12 (A-52).

[9] Stipulated Fact No. (1)M, paragraph one (A-31).

[10] Stipulated Fact No. (1)M (A-30 through A-32).

[11] Stipulated Fact No. (1)J (A-30).

[12] Stipulated Fact No. (1)K (A-30); Exhibit 10D pages 7-9 (A-94 through A-96).

[13] Transcript p. 173, lines 3-4 (A-66); p. 130, line 24 through p. 131 line 2 (A-41).

The minutes of the meeting of the Board of Trustees held on April 15, 1977 were admitted into evidence as Exhibit 10(d) of the pre-trial order.[14] On pages seven through nine of the minutes it is shown that the rule was explained, discussed and adopted in accordance with the established procedures of the Trust Fund.

The Fund Consultant and Attorney joined in recommending its adoption, advising that the failure to adopt it would be very detrimental financially to the Trust Fund.[15] The amendment provides:

> In the event that a Collective Bargaining Agreement requiring contributions to the Welfare Fund is not succeeded by a Collective Bargaining Agreement requiring contributions to the Welfare Fund, then a Participating Employer which is no longer obligated under the terms of a Collective Bargaining Agreement to make contributions to the Welfare Fund shall cease being a Participating Employer on the date that the obligation terminates, and its Employees shall not be Eligible Employees as to any claims incurred on or after the thirty-first calendar day following the date on which the obligation to contribute terminated.[16]

If the amendment were not adopted then either the contribution rate would have had to be raised substantially or a reduction would have had to be made in the amount of benefits payable under the Plan.[17]

After the rule was adopted it was made part of a supplemental booklet which was distributed to the Participants in the Plan.[18] The challenged rule has never been applied to either of the Plaintiffs or to anyone represented by the Plaintiffs.[19]

---

[14] (A-94 through A-96).

[15] Transcript p. 131, lines 17-18 (A-41); Transcript p. 98, lines 17-21 (A-68).

[16] Stipulated Fact No. (1)K, paragraph 2(b) (A-30).

[17] Transcript, p. 170, line 10 through p. 171 line 4 (A-65).

[18] Stipulated Fact No. (1)N (A-32 through A-33).

[19] Stipulated Fact No. (1)I (A-30).

REASONS WHY THE PETITION FOR THE WRIT OF CERTIORARI SHOULD BE DENIED

I.

THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS.

The decision below is not in conflict with the decisions of other Federal Courts. To the contrary, the Circuit Court of Appeals for the Sixth Circuit recently considered and upheld a rule identical to the one challenged in this cause. *Pierce, et al.* v. *Neca-Ibew Welfare Trust Fund,* 620 F. 2d 589 (6th Cir. 1980) cert. denied ____ U. S. ____, 101 S. Ct. 574 (1981). The Sixth Circuit in so doing recognized that Trustees have wide discretion in the administration of employee benefit plans and Federal Courts will not interfere unless the Trustees' actions have been arbitrary and capricious. This principle has been adopted by the Circuit Court of Appeals for the First Circuit in *Rueda* v. *Seafarers International Union, et al.,* 576 F. 2d 939 (1978); the Second Circuit in *Riley* v. *MEBA Pension Trust,* 570 F. 2d 406 (1977); the Third Circuit in *Gomez* v. *Lewis,* 414 F. 2d 1312 (1969); the Fifth Circuit in *Bayles* v. *Central States Southeast and Southwest Areas Pension Fund,* 602 F. 2d 97 (1979); the Sixth Circuit in *Local No. 5 et al.* v. *Mahoning and Trumbull County Building Trades Welfare Fund, et al.,* 541 F. 2d 636 (1976); the Seventh Circuit in *Johnson* v. *Botica,* 537 F. 2d 930 (1976); the Eighth Circuit in *Bueneman* v. *Central States Southeast and Southwest Areas Pension Fund,* 572 F. 2d 1208 (1978); the Ninth Circuit in *Tomlin* v. *Board of Trustees, et al.,* 586 F. 2d 148 (1978); the Tenth Circuit in *Mestas* v. *Huge, et al.,* 585 F. 2d 450 (1978); and the D. C. Circuit in *Roark* v. *Lewis,* 401 F. 2d 425 (1968) and *Miniard* v. *Lewis,* 387 F. 2d 864 (1967).

Inasmuch as there is not only no conflict between the Circuits, but unanimity among them as to the standard to be applied, Respondents respectfully submit that the Petition for a Writ of Certiorari be denied.

II.

THE DECISION BELOW WAS FULLY CONSIDERED, CORRECTLY DECIDED IN ACCORDANCE WITH FEDERAL LAW AND DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL IMPORTANCE TO THE PUBLIC WHICH THIS COURT SHOULD DECIDE.

Petitioners, in an effort to induce this Court to grant the Petition, argue that employer contributions to a welfare benefit plan are wages. That is true only in the sense that they are part of the Employer's hourly labor cost. It is not true in the sense that any particular employee has a property right in any particular contributions. Employer contributions to a Welfare Fund are not wages. Rather, they are monies which are paid to Trustees who are charged with the responsibility to establish such eligibility rules and benefit provisions as they believe to be proper. These contributions are not subject to federal withholding tax for any individual at the time the contribution is made by the Employer because they are not the property of the Employee. In the event that welfare contributions are discontinued the hourly wage scale would be increased in an amount equal to the amount of contributions that had been required to be paid to the Welfare Fund. But, unless and until that occurred, these contributions are not considered as income to the Employees. Nor is it accurate to characterize these contributions as creating something analogous to a vested right.

The concepts of vesting and accrued rights are terms which apply to retirement plans. That there is no "vesting" in welfare benefit plans such as the Plan operated by the Trustees is supported by ERISA, which states that the vesting part of the Act does not apply to an employee welfare benefit plan. (29 U. S. C. 1051 (1)). There are no "accrued rights or vested rights" affected by the challenged amendment.

The phrase "accrued rights" was discussed on August 12, 1974 in House Report 93-1280 to H. R. 2, which became law as ERISA, as follows:

> Under the conference substitute the term "accrued benefit" refers to pension or retirement benefits. The term does not apply to . . . payments of medical expenses . . . Legislative History of the Employee Retirement Income Security Act, 1974 (April 1976) Vol. III, p. 4540.

The term "vesting" was discussed on February 26, 1974 as part of the floor debate on H. R. 2, as follows:

> Vesting refers to the nonforfeitable right or interest which an employee participant acquires in the *pension fund.* (emphasis added). *Id.* Vol. II at 3379.

Eligibility rules can be changed. A claim is paid, subject to the limitations as to amounts in the Plan of Benefits, only to participants who are eligible for benefits at the time that a claim is incurred.

As the Seventh Circuit pointed out below ". . . welfare benefits do not become vested until a claim arises that is payable under the Plan; these benefits are contractual rights subject to amendment by the parties to the Agreement." *International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 111, et al* v. *Douglas, et al,* 646 F. 2d 1211, 1213 (7th Cir. 1981).

This position is in accord with a decision of the United States Court of Appeals for the Ninth Circuit a case in which certain participants challenged an amendment to a welfare plan which reduced the benefits they would have received had the rules not been amended. The Court dealt with the "vesting" argument, stating that:

> . . . [t]he health and welfare benefits were not vested property rights but were instead contractual rights subject to amendment by the parties to the agreement. *Turner* v. *Local Union No. 302,* 604 F. 2d 1219, 1226, (9th cir. 1979).

Central to Petitioners' argument is that the individual employees in some way have individual vested rights to the

employer contributions made to the Welfare Fund. They do not. The rights they have are collective rights which are contingent upon meeting the requirements of the eligibility rules established by the Trustees that are in effect at the time they incur a claim for medical expenses. With respect to fringe benefit contributions to a multi-employer pension fund, this Court noted that the "employees paid nothing to the Plan themselves." *Teamsters* v. *Daniels,* 439 U. S. 552, 553 (1979). This Court further noted that it is "inaccurate to describe these payments as having been 'on behalf' of any employee". *Id.* at 560. This is in accord with the decision in *Walsh* v. *Schlecht,* 429 U. S. 401 (1977).

The Trustees' position that there is no concept of "vesting" in the case of employee welfare benefit plans is supported by ERISA, which specifically states that the Vesting Title of the Act does not apply to employee welfare benefit plans. (29 U. S. C. 1051(1)). Petitioners have cited no statute or decision that would support the opposite conclusion.

When this challenged rule was adopted the Trustees did have alternatives. They could have decided to offer the full benefit plan to only those jurisdictions in which a substantially higher rate of contributions could be negotiated to provide for a reserve fund for use when and if one of the participating Local Union jurisdictions were to withdraw.

Among the factors considered by the trustees in adopting the amendment was a balancing of the cost of establishing such a reserve and the benefit to the participants in doing so.

To have established such a reserve would have greatly increased the Employer's labor cost, which would have been passed on to the consumer. Yet until and unless one of the participating Unions were to decide to voluntarily withdraw and start or join another welfare fund, the employees participating in the Trust Fund would have received no increase in benefits.

The Trustees decided not to place an increased burden on the industry merely to provide funds for an event that might not happen or happen only infrequently. The Trustees had to take action to protect the assets of the Trust Fund. Rather than establish a large special reserve, they decided to adopt a limitation on the trust's liability in the event of the possibility of such a withdrawal. It should be noted that at the time the challenged rule was adopted no Local Union had withdrawn from participation in the Welfare Plan or even notified the Trustees of an intention to do so at some time in the future, if ever.

The Trustees could have adopted a different rule. However, as was observed by the Ninth Circuit, "(Courts) . . . must be ever mindful that it is for the Trustees, not the Courts, to choose between two reasonable alternatives." *Tomlin* v. *Board of Trustees of the Construction Laborers Pension Trust for Southern California,* 586 F. 2d 148, 151 (9th Cir. 1978). See also, *Rueda* v. *Seafarers International Union, et al,* 576 F. 2d 939, 942-943 (8th Cir. 1978); *Riley* v. *Meba Pension Trust,* 570 F. 2d 406, 412 (2nd Cir. 1977); *Rehmar* v. *Smith,* 555 F. 2d 1362 (9th Cir. 1976).

The decision below is in accord with well established federal law and there is no compelling need for this Court to grant the Petition for Writ of Certiorari.

III.

THE PETITION SHOULD BE DENIED BECAUSE IT FAILS TO PRESENT WITH ACCURACY THE ISSUES ESSENTIAL TO A READY AND ACCURATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

The Petition is phrased in several places in a manner which is not accurate and which appears to have been intended to mislead this Court as to the actual circumstances surrounding this litigation.

On Page 5 of the Petitioners' Brief it is asserted that the Sixth Circuit in *Pierce* did not deal with the issue of "whether the accumulated reserves were earned". It should be noted in the interests of accuracy that there was no "earning" of "accumulated reserves" and no monies were set aside or earmarked for use in funding any one portion of the eligibility rules. Participants did not have individual accounts into which monies were credited. Apart from the factual inaccuracies in the assertion, it is not correct to state that the issue was not raised in *Pierce*. In the District Court opinion the issue was discussed using the phrase vested rights rather than speaking of earned rights. The basic concept, however, is the same. The District Court in *Pierce* stated that "[u]nder the provisions of the Plan it cannot be said that the benefits become 'vested' in the true sense of that term until a claim arose that was payable under the then current provisions of the Plan". *Pierce, et al.* v. *NECA-IBEW Welfare Trust Fund,* 488 F. Supp. 559, 564 (E. D. Tn. 1978). The Sixth Circuit in *Pierce* listed this as one of the issues and then adopted the opinion of the district court. 620 F. 2d 589, 591.

On Page 6 of the Petitioners' Brief it is stated that one question of "first impression with this Court" is the extent to which "promises or representations of Trustees . . . impose limitations on the exercise of (the Trustees) discretion". However, no promises or representations were made by the Trustees that have any relevance in this case. The inclusion of reference to such promises or representations when in fact none were made seems to the Respondents to be singularly inappropriate.

While not made part of Petitioners' "Questions Presented", there are two questions raised on Page 7 of their Brief that deserve comment because they are phrased in a way that is particularly misleading. In the first numbered question a conflict is alleged to exist between LMRA and ERISA. This conflict is raised by a misrepresentation of the facts in the second half of the sentence. In the second numbered question a

similar factual misrepresentation is made. In the first question reference is made to actions by the Trustees to "reduce the value of a reserve fund". In the second sentence reference is made to "manipulation of reserve funds so as to destroy their value". These statements imply some sort of fraud or malfeasance, implications that are unwarranted and which were not discussed in either the opinion filed by the District Court or the Court of Appeals. There were not only no funds "manipulated", there were no transfers of any monies involved at all in this litigation. Since there have been no monies ever set aside as reserve funds for any one portion of the eligibility rules it is hardly accurate to speak of their being reduced in value. What is challenged is an amendment to eligibility rules of an employee benefit plan which was adopted in order to protect the financial integrity of the Trust Fund in the event that one of the Local Unions decided to voluntarily withdraw from participation in the Trust Fund.

CONCLUSION

Because there has been no misapplication of law, no conflict among the Circuits, no issue of substantial importance to the public which this Court should decide and for the other reasons stated in this Brief it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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